

**UNITED STATES DISTRICT COURT**  
**DISTRICT OF NEVADA**

MYRDUS ARCHIE,

Petitioner,

vs.

SHERYL FOSTER, *et al.*,

Respondents.

2:10-cv-01968-RLH-NJK

**ORDER**

This action is a petition for a writ of habeas corpus filed pursuant to 28 U.S.C. § 2254, by a Nevada state prisoner represented by counsel. Before the Court is respondents' motion to partially dismiss the amended petition. (ECF No. 37).

**I. Procedural History**

On September 10, 2003, the State filed an amended complaint in the Las Vegas Township Justice Court, charging petitioner and her co-defendant with Count 1, conspiracy; Count 4, robbery with a deadly weapon; Count 5, murder with a deadly weapon; Count 6, robbery with a deadly weapon; and Count 7, attempted murder with a deadly weapon. (Exhibit A).<sup>1</sup> At the conclusion of the preliminary hearing on October 27, 2003, the justice of the peace bound petitioner and her co-defendant over to the district court. (Exhibit 20B). On November 6, 2003, the State filed a criminal

<sup>1</sup> The exhibits referenced in this order are found in the Court's record at ECF Nos. 34, 35 & 37.

1 information in the Eighth Judicial District Court for the State of Nevada, charging petitioner with the  
2 same crimes as alleged in the amended criminal complaint. (Exhibit 19).<sup>2</sup> At her arraignment on  
3 November 18, 2004, petitioner entered a plea of not guilty. (Exhibit B).

4 On September 8, 2004, petitioner filed a motion to sever. (Exhibit C). On November 18,  
5 2003, petitioner filed a second motion to sever her case from that of her co-defendant. (Exhibit D).  
6 The trial court denied the motions to sever in an order filed February 2, 2005. (Exhibit E).

7 Petitioner's trial was held January 2, 2007, through January 24, 2007. (Exhibits 21-23B;  
8 Exhibits 25-34). The jury rendered guilty verdicts against petitioner for conspiracy, two counts of  
9 robbery with a deadly weapon, attempted murder with a deadly weapon, and second degree murder  
10 with a deadly weapon. (Exhibit 35).

11 Petitioner was sentenced on March 13, 2007. (Exhibit 37). The trial court found that  
12 petitioner was a habitual criminal offender and sentenced her to the following: Count 1, 24-60  
13 months imprisonment; Count 3, life without parole consecutive to Count 1; Count 4, life without  
14 parole, concurrent with Count 3; Count 5, life without parole to run consecutive to all other counts;  
15 Count 6, life without parole to run consecutive to all other counts. (Exhibit 44). The judgment of  
16 conviction reflecting petitioner's convictions and sentences was filed on March 27, 2007. (*Id.*).

17 Petitioner appealed her convictions and sentences on direct appeal. (Exhibits 3, 6, 8). On  
18 February 25, 2010, the Nevada Supreme Court entered an order affirming in part, reversing in part,  
19 and remanding petitioner's case to the state district court. (Exhibit 1). The Nevada Supreme Court  
20 reversed petitioner's conviction for attempted murder because the State presented no evidence that  
21 petitioner possessed the specific intent to kill. (Exhibit 1, at pp. 1-3). The Nevada Supreme Court  
22 affirmed all of petitioner's other convictions and remanded the case for entry of an amended  
23 judgment of conviction. (Exhibit 1, at p. 10). The state district court re-sentenced petitioner and  
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25 <sup>2</sup> Petitioner's co-defendant was charged with Count 2 (burglary) and Count 3 (larceny) of the  
26 information, but petitioner was not charged with these two counts.

1 filed an amended judgment of conviction on May 6, 2010, rescinding the sentence for attempted  
2 murder. (Exhibit 45).

3 On November 9, 2010, this Court received petitioner's *pro se* federal habeas corpus petition.  
4 (ECF No. 1-2). Although petitioner does not indicate the date on which she dispatched her federal  
5 petition, she signed the petition on November 4, 2010. (ECF No. 1-2, at p. 21). By order filed  
6 January 24, 2011, this Court granted petitioner's motion for counsel. (ECF No. 8). After the Federal  
7 Public Defender notified the Court of its inability to represent petitioner, the Court appointed  
8 attorney Beau Sterling to represent petitioner. (ECF No. 10). On July 11, 2011, counsel for  
9 petitioner filed a motion for a stay pending disposition of petitioner's state post-conviction habeas  
10 proceedings. (ECF No. 13). Respondents filed a response in which they indicated that they took no  
11 position regarding the motion. (ECF No. 15). By order filed December 7, 2011, the Court granted  
12 petitioner a stay for the purpose of concluding state court proceedings on the post-conviction habeas  
13 petition. (ECF No. 16).

14 On May 6, 2011, through appointed counsel, petitioner filed a post-conviction habeas petition  
15 in the state district court. (Exhibit 16). At a hearing on October 9, 2012, the state district court  
16 denied the post-conviction habeas petition. (Exhibit 38, Minutes of 10/9/2012). On November 1,  
17 2011, the state district court entered findings of fact, conclusions of law, and order denying the  
18 habeas petition. (Exhibit 42). Petitioner did not appeal the state district court's order denying her  
19 habeas petition.

20 Petitioner, acting *pro se*, filed a motion to withdraw counsel in this Court on October 23,  
21 2012. (ECF No. 18). This Court denied the motion without prejudice. (ECF No. 20). On May 31,  
22 2013, petitioner filed a second *pro se* motion to withdraw counsel, asking that attorney Beau Sterling  
23 be taken off the case, and requesting substitute counsel. (ECF No. 27). On July 29, 2013, this Court  
24 granted petitioner's motion, relieving appointed counsel Beau Sterling, and appointing attorney Todd  
25 M. Leventhal as petitioner's new counsel. (ECF No. 29). On August 28, 2013, attorney Leventhal  
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1 filed a status report on behalf of petitioner, seeking to reopen this action. (ECF No. 30). On  
 2 November 15, 2013, this Court granted the request to reopen the case and set a deadline for the filing  
 3 of an amended petition. (ECF No. 32). Petitioner filed an amended petition on January 15, 2014,  
 4 along with exhibits. (ECF Nos. 34 & 35). The amended petition raises nine grounds for relief.  
 5 (ECF No. 34). Respondents have filed the instant motion to partially dismiss the amended petition.  
 6 (ECF No. 37). Through counsel, petitioner has filed an opposition to the motion to dismiss. (ECF  
 7 No. 38). Respondents have filed a reply. (ECF No. 41)

## 8 **II. Discussion**

9 Respondents argue that portions of the amended petition are unexhausted, that some claims  
 10 are untimely, and some claims fail to state a claim for federal habeas corpus relief. (ECF No. 37).

### 11 **A. Timeliness and Relation-Back**

12 Respondents argue that parts of Grounds 1, 2, 3, and 7 of the amended petition are untimely  
 13 because the claims do not relate back to petitioner's original federal petition pursuant to *Mayle v.*  
 14 *Felix*, 545 U.S. 644, 657 (2005). The Antiterrorism and Effective Death Penalty Act (AEDPA)  
 15 amended the statutes controlling federal habeas corpus practice to include a one-year statute of  
 16 limitations on the filing of federal habeas corpus petitions. With respect to the statute of limitations,  
 17 the habeas corpus statute provides:

18 (d)(1) A 1-year period of limitation shall apply to an application  
 19 for a writ of habeas corpus by a person in custody pursuant to the  
 judgment of a State court. The limitation period shall run from  
 the latest of—

20 (A) the date on which the judgment became final by the  
 21 conclusion of direct review or the expiration of the time  
 for seeking such review;

22 (B) the date on which the impediment to filing an  
 23 application created by State action in violation of the  
 Constitution or laws of the United States is removed, if the  
 24 applicant was prevented from filing by such State action;

25 (C) the date on which the constitutional right asserted was  
 26 initially recognized by the Supreme Court, if the right has

1                   been newly recognized by the Supreme Court and made  
2                   retroactively applicable to cases on collateral review; or

3                   (D) the date on which the factual predicate of the claim or  
4                   claims presented could have been discovered through the  
5                   exercise of due diligence.

6                   (2) The time during which a properly filed application for State  
7                   post-conviction or other collateral review with respect to the  
8                   pertinent judgment or claim is pending shall not be counted  
9                   toward any period of limitations under this subsection.

10                  28 U.S.C. § 2244(d).

11                  For purposes of the AEDPA limitations period, “a judgment becomes ‘final’ in one of two  
12                  ways – either by the conclusion of direct review by the highest court, including the United States  
13                  Supreme Court, to review the judgment, or by the expiration of the time to seek such review, again  
14                  from the highest court from which such direct review could be sought.” *Wixom v. Washington*, 264  
15                  F.3d 894, 897 (9<sup>th</sup> Cir. 2001). Once the judgment of conviction becomes final, the petitioner has 365  
16                  days to file a petition for relief under 28 U.S.C. § 2254, with tolling of the time for filing during the  
17                  pendency of a properly filed application for state post-conviction or other collateral review with  
18                  respect to the pertinent judgment or claim . . . .” 28 U.S.C. § 2254(d).

19                  In the instant case, the amended judgment of conviction was filed on May 6, 2010. (Exhibit  
20                  45). Petitioner had thirty days after May 6, 2010, within which to file a direct appeal. Nevada Rules  
21                  of Appellate Procedure, Rule 4. Petitioner did not pursue a direct appeal from the amended  
22                  judgment of conviction. Where a petitioner does not appeal from his judgment of conviction, the  
23                  one-year AEDPA limitations period begins to run on the date on which the time to seek appeal  
24                  expires. 28 U.S.C. § 2244(d)(1)(a); NRAP 4. Thus, petitioner’s conviction became final on June 5,  
25                  2010, the deadline for filing a direct appeal. Pursuant to the AEDPA, petitioner then had one year  
26                  within which to file the federal habeas petition, unless the time was otherwise tolled. The AEDPA  
27                  statute of limitations expired on June 5, 2011. The original petition, filed November 4, 2010, was  
28                  timely filed. *See Houston v. Lack*, 487 U.S. 266, 270 (1988) (pursuant to the “mailbox rule,” federal

1 courts deem the filing date of a document as the date that it was given to prison officials for mailing).  
2 The amended petition, filed March 12, 2014, was filed well after the expiration of the AEDPA  
3 statute of limitations. Therefore, the Court must determine if the claims raised in the amended  
4 petition relate back to the original petition, pursuant to *Mayle v. Felix*, 545 U.S. 644, 664 (2005).

5 Under Federal Rule of Civil Procedure 15, an amended pleading “relates back” to the original  
6 pleading only if the acts described in the amended pleading are set forth in the original pleading.  
7 Fed. R. Civ. P. 15(c)(2). An amended habeas petition only relates back if the amended claims are  
8 tied to the “same core of operative facts” as alleged in the original petition. *Mayle v. Felix*, 545 U.S.  
9 644, 664 (2005). In *Mayle*, the petitioner originally raised only a Confrontation Clause claim in his  
10 habeas petition, based on the admission of video-taped prosecution witness testimony. 545 U.S. at  
11 648-49. After the one-year AEDPA statute of limitations had passed, petitioner then sought to  
12 amend his habeas petition to allege a Fifth Amendment claim based on coercive police tactics used  
13 to obtain damaging statements from him. *Id.* The factual basis for each claim was distinct.  
14 Petitioner then argued that his amended claim related back to the date of his original habeas petition  
15 because the claim arose out of the same trial, conviction or sentence. *Id.* at 659-661. In rejecting  
16 petitioner’s argument the Supreme Court held that if “claims asserted after the one-year period could  
17 be revived simply because they relate to the same trial, conviction, or sentence as a timely filed  
18 claim, AEDPA’s limitation period would have slim significance.” *Id.* at 662.

### 19 **1. Ground 1**

20 In Ground 1 of the of the amended petition, petitioner alleges that her rights under the Fifth,  
21 Sixth, and Fourteenth Amendments to the United States Constitution were violated. Specifically, her  
22 right to effective assistance of counsel, right to confront witnesses, and due process rights were  
23 violated because the trial court allowed jurors to pose written questions to the witnesses without  
24 consultation with counsel and otherwise failed to comply with procedures for questions from jurors,  
25 as set forth in *Flores v. State*, 965 P.2d 901 (Nev. 1998). (ECF No. 34, at pp. 13-18). In her original  
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1 petition, petitioner alleges her due process rights, and her rights under the Fifth, Sixth, and  
2 Fourteenth Amendments were violated because of the improper use of questions from jurors that  
3 failed to comply with *Flores v. State*, 965 P.2d 901 (Nev. 1998). (ECF No. 5, at p. 3). The factual  
4 predicate underlying the claims in the original petition and the amended petition is the same – a  
5 challenge to the trial court having allowed jurors to pose written questions to the witnesses without  
6 consultation with counsel and without complying with procedures set forth in *Flores v. State*, 965  
7 P.2d 901 (Nev. 1998). As such, Ground 1 of the amended petition relates back to the original  
8 petition, and is therefore deemed timely.

## 9 **2. Ground 2**

10 In Ground 2 of the amended petition, petitioner alleges that her rights to a fair trial and due  
11 process were violated due to the failure of the trial court to sever her capitally charged co-defendant  
12 who had additional charges not involving petitioner tried in the case. Petitioner alleges that this  
13 forced her to be tried by a jury that was qualified to render a death sentence. (ECF No. 34, at pp. 19-  
14 25). In the original petition, petitioner alleges that her rights to a fair trial and due process were  
15 violated based on the trial court's failure to sever the case from her co-defendant. (ECF No. 5, at p.  
16 5). Respondents argue that the amended petition contains a new claim, that "the trial court also  
17 persuaded [petitioner's] counsel to relinquish the right to a limiting instruction relative to the theft of  
18 the purse from an occupied vehicle (larceny from a person) with which Ms. Archie was not charged."  
19 (ECF No. 34, at p. 20). Although this particular fact was not alleged in the original petition, the  
20 allegation is tied to the same core of operative facts as alleged in the original petition. As such,  
21 Ground 2 of the amended petition relates back to the original petition, and is therefore timely.

## 22 **3. Ground 3**

23 Petitioner alleges that she was "convicted and sentenced in violation of her Sixth, Eighth, and  
24 Fourteenth Amendment rights to a jury of her peers, a fair and unbiased jury, effective assistance of  
25 counsel, equal protection, and right to due process because the State and the trial court peremptorily  
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1 challenged only the African-American to sit in the jury venire, who would have been juror number  
2 12, but for the State's challenge." (ECF No. 34, at p. 26). Petitioner further claims that "the trial  
3 court failed to record the *Batson* challenges of the three defense counsel thus removing Ms. Archie's  
4 only proof of the insufficiency of the State's race-neutral reason for the challenge, if any were  
5 given." (*Id.*). Respondents argue that Ground 3 of the amended petition raises new claims of  
6 ineffective assistance of counsel and a new substantive claim regarding the trial court's failure to  
7 record bench conferences, which were not alleged in the original petition. These claims do not relate  
8 back to the original petition and are therefore untimely.

#### 9 **4. Ground 7**

10 In Ground 7 of the amended petition, petitioner alleges that she was "convicted and sentenced  
11 in violation of her rights under the Fifth and Fourteenth Amendments to the United States  
12 Constitution to equal protection of the law and due process because the trial court erred in giving  
13 jury instructions on express and implied malice and the instruction relative to the State's burden of  
14 proof." (ECF No. 34, at p. 50). The corresponding claim in the original petition is Ground 8, in  
15 which petitioner alleges that her due process rights were violated by jury instructions 17 and 18, the  
16 instructions defining express and implied malice and malice aforethought. (ECF No. 5, at p. 17).  
17 Respondents contend that two claims raised in Ground 5 of the amended petition were raised for the  
18 first time: the substantive challenge to the instructions concerning the burden of proof and the  
19 ineffective assistance of counsel claim. Indeed, the amended petition alleges ineffective assistance  
20 of trial and appellate counsel for failing to object to the language of the malice instructions. (ECF  
21 No. 34, at p. 50). The amended petition further alleges that the instruction on the State's burden of  
22 proof allowed the jury to convict her of murder based on a lesser standard of proof than beyond a  
23 reasonable doubt. (ECF No. 34, at p. 51). The amended petition challenges the general intent  
24 instruction (Instruction No. 36) and alleges that trial and appellate counsel were ineffective for  
25 failing to raise appropriate objections to the instruction. (ECF No. 34, at p. 51-52). These  
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1 allegations, raised for the first time in the amended petition, are not based on the same core of  
2 operative facts as alleged in the original petition. (*Compare* ECF No. 34, at pp. 50-52 *with* ECF No.  
3 5, at p. 17). Thus, the challenge to the instructions concerning the burden of proof and the  
4 ineffective assistance of counsel claims in Ground 7 of the amended petition do not relate back to the  
5 original petition. Therefore, these claims are dismissed as untimely. However, the amended  
6 petition's challenge to the jury instructions on express and implied malice do relate back to the  
7 original petition and are deemed timely.

### 8 **B. Exhaustion**

9 Respondents argue that each ground of the amended petition is unexhausted in whole or in  
10 part. A federal court will not grant a state prisoner's petition for habeas relief until the prisoner has  
11 exhausted his available state remedies for all claims raised. *Rose v. Lundy*, 455 U.S. 509 (1982); 28  
12 U.S.C. § 2254(b). A petitioner must give the state courts a fair opportunity to act on each of his  
13 claims before he presents those claims in a federal habeas petition. *O'Sullivan v. Boerckel*, 526 U.S.  
14 838, 844 (1999); *see also Duncan v. Henry*, 513 U.S. 364, 365 (1995). A claim remains  
15 unexhausted until the petitioner has given the highest available state court the opportunity to  
16 consider the claim through direct appeal or state collateral review proceedings. *See Casey v. Moore*,  
17 386 F.3d 896, 916 (9<sup>th</sup> Cir. 2004); *Garrison v. McCarthey*, 653 F.2d 374, 376 (9<sup>th</sup> Cir. 1981).

18 A habeas petitioner must "present the state courts with the same claim he urges upon the  
19 federal court." *Picard v. Connor*, 404 U.S. 270, 276 (1971). To satisfy exhaustion, each of  
20 petitioner's claims must have been previously presented to the Nevada Supreme Court, with  
21 references to a specific constitutional guarantee, as well as a statement of facts that entitle petitioner  
22 to relief. *Koerner v. Grigas*, 328 F.3d 1039, 1046 (9<sup>th</sup> Cir. 2002). The federal constitutional  
23 implications of a claim, not just issues of state law, must have been raised in the state court to  
24 achieve exhaustion. *Ybarra v. Sumner*, 678 F. Supp. 1480, 1481 (D. Nev. 1988) (citing *Picard*, 404  
25 U.S. at 276)). To achieve exhaustion, the state court must be "alerted to the fact that the prisoner [is]

1 asserting claims under the United States Constitution” and given the opportunity to correct alleged  
 2 violations of the prisoner’s federal rights. *Duncan*, 513 U.S. at 365 (1995); see *Hiivala v. Wood*, 195  
 3 F.3d 1098, 1106 (9<sup>th</sup> Cir. 1999). It is well settled that 28 U.S.C. § 2254(b) “provides a simple and  
 4 clear instruction to potential litigants: before you bring any claims to federal court, be sure that you  
 5 first have taken each one to state court.” *Jiminez v. Rice*, 276 F.3d 478, 481 (9<sup>th</sup> Cir. 2001) (quoting  
 6 *Rose v. Lundy*, 455 U.S. 509, 520 (1982)).

7 A claim is not exhausted unless the petitioner has presented to the state court the same  
 8 operative facts and legal theory upon which his federal habeas claim is based. *Bland v. California*  
 9 *Dept. Of Corrections*, 20 F.3d 1469, 1473 (9<sup>th</sup> Cir. 1994); see *Duncan*, 513 U.S. at 365-66; see also  
 10 *Castillo v. McFaddin*, 399 F.3d 993, 999 (9<sup>th</sup> Cir. 2005). The exhaustion requirement is not met  
 11 when the petitioner presents to the federal court facts or evidence which place the claim in a  
 12 significantly different posture than it was in the state courts, or where different facts are presented at  
 13 the federal level to support the same theory. See *Nevius v. Sumner*, 852 F.2d 463, 470 (9<sup>th</sup> Cir.  
 14 1988); *Pappageorge v. Sumner*, 688 F.2d 1294, 1295 (9<sup>th</sup> Cir. 1982). A federal habeas petition may,  
 15 however, present new, additional, or supplemental facts that were not considered in the state court,  
 16 so long as the evidence does not “fundamentally alter the legal claim already considered by the state  
 17 courts.” *Vasquez v. Hillery*, 474 U.S. 254, 260 (1986); see also *Lopez v. Schiro*, 491 F.3d 1029,  
 18 1040 (9<sup>th</sup> Cir. 2007); *Weaver v. Thompson*, 197 F.3d 359, 364 (9<sup>th</sup> Cir. 1999).

### 19 **1. Ground 1**

20 In Ground 1 of the of the amended petition, petitioner alleges that her rights under the Fifth,  
 21 Sixth, and Fourteenth Amendments to the United States Constitution were violated. Specifically,  
 22 petitioner alleges that her rights to effective assistance of counsel, to confront witnesses, and to due  
 23 process were violated because the trial court allowed jurors to pose written questions to the witnesses  
 24 without consultation with counsel and otherwise failed to comply with procedures for questions from  
 25 jurors, as set forth in *Flores v. State*, 965 P.2d 901 (Nev. 1998). (ECF No. 34, at pp. 13-18).

1 Respondents argue that the allegations of ineffective assistance of counsel and violation of the right  
2 to confront witnesses are unexhausted. On direct appeal, in the supplemental opening brief,  
3 petitioner alleged that her rights to “due process, equal protection, a fair trial, and right to counsel”  
4 were violated because the trial court allowed jurors to ask questions of the witnesses without  
5 consulting counsel and without following the safeguards established in *Flores v. State*. Petitioner  
6 cited to the United States Constitution, at Amendments V, VI, VII, and XIV. (Exhibit 6, at p. 4). In  
7 the supplemental opening brief filed at the Nevada Supreme Court, petitioner did allege that his right  
8 to counsel was violated, therefore this Court finds the claim to be exhausted. (Exhibit 6, at p. 4).  
9 However, petitioner’s citation to the United States Constitution’s Sixth Amendment does not satisfy  
10 the exhaustion requirement regarding the alleged violation of the Confrontation Clause. Nowhere in  
11 the opening brief or the supplemental opening brief did petitioner allege a violation of her right to  
12 confront witnesses. (Exhibits 3 & 6). A petitioner does not exhaust state remedies by generally  
13 appealing to a broad constitutional provision alone. *See Gray v. Netherland*, 518 U.S. 152, 163 (9<sup>th</sup>  
14 Cir. 1996). In order to present the substance of a claim to a state court, the petitioner must reference  
15 a specific federal constitutional provision as well as a statement of facts that entitle the petitioner to  
16 relief. *Id.* at 162-63. This Court finds that petitioner’s allegation of a violation of the right to  
17 confront witnesses was not raised on direct appeal, or otherwise, to the Nevada Supreme Court. As  
18 such, the Confrontation Clause claim within Ground 1 is unexhausted. The remainder of Ground 1  
19 is exhausted.

## 20 **2. Ground 2**

21 In Ground 2 of the amended petition, petitioner alleges that her rights to a fair trial and due  
22 process were violated because the trial court failed to sever her capital charged co-defendant, who  
23 had additional charges not involving petitioner tried in the case. (ECF No. 34, at pp. 19-25).  
24 Petitioner alleges the trial court’s refusal to sever the case forced her to be tried by a jury that was  
25 qualified to render a death sentence. (*Id.*).  
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1 Respondents contend that, in Ground 2 of the amended federal petition, petitioner places the  
2 claim in a significantly different posture by arguing facts not presented to the Nevada Supreme  
3 Court. Specifically, the amended federal petition alleges that the prejudice resulting from the failure  
4 to sever “was magnified by the bloody horrific photographs of Christine Anziano and Kirk Cole.”  
5 (ECF No. 34, at p. 20). The amended petition continues: “Anyone seeing this evidence would have  
6 been shocked and revulsed and likely to seek ‘justice’ from anyone associated with these crimes.”  
7 (*Id.*). Nowhere, in the state appellate briefs on direct appeal, did petitioner rely on photographs of  
8 Anziano and Cole as an alleged error based on the failure to sever because her co-defendant faced  
9 additional charges. As such, the allegations concerning the gruesome photographs of Christine  
10 Anziano and Kirck Cole are unexhausted.

11 Respondents next argue that petitioner added facts to the amended federal petition, arguing  
12 the alleged reliance of the jury on witnesses testimony, specifically, the color of the motor vehicle in  
13 Las Vegas, including unsupported claims that foreign cars from the 1980's and 1990's “still littered  
14 the road” in Las Vegas at the time of the incident as well as claims from surveys released after  
15 petitioner’s trial discussing the color of vehicles and questions regarding the ownership of purses  
16 found in petitioner’s residence. (ECF No. 34, at pp. 20-25). In the briefing to the Nevada Supreme  
17 Court, petitioner did not argue any significance based on the type and color of her vehicle, or the  
18 ownership of purses in petitioner’s residence, as this may relate to the alleged failure to sever  
19 because her co-defendant faced additional charges. These additional allegations are therefore  
20 unexhausted.

21 Respondents next argue that the amended petition includes a fact never raised to the Nevada  
22 Supreme Court – that “the trial court also persuaded [petitioner’s] counsel to relinquish the right to a  
23 limiting instruction relative to the theft of a purse from an occupied vehicle.” (ECF No. 34, at p. 20).  
24 On direct appeal, petitioner never raised the claim that the trial court persuaded trial counsel to  
25 reconsider the request for a limiting instruction. As such, the claim that “the trial court also  
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1 persuaded [petitioner's] counsel to relinquish the right to a limiting instruction relative to the theft of  
2 a purse from an occupied vehicle" within Ground 2 is unexhausted. The remainder of Ground 2,  
3 alleging that petitioner was denied due process and a fair trial because the trial court refused to grant  
4 a severance of the joint trial between petitioner and her co-defendant, forcing petitioner to be tried by  
5 a jury that was qualified to render a death sentence, is exhausted.

### 6 **3. Ground 3**

7 In Ground 3 of the amended petition, petitioner alleges that she was "convicted and sentenced  
8 in violation of her Sixth, Eighth, and Fourteenth Amendment rights to a jury of her peers, a fair and  
9 unbiased jury, effective assistance of counsel, equal protection, and right to due process because the  
10 State and the trial court peremptorily challenged only the African-American to sit in the jury venire,  
11 who would have been juror number 12, but for the State's challenge." (ECF No. 34, at p. 26).  
12 Petitioner further claims that "the trial court failed to record the *Batson*<sup>3</sup> challenges of the three  
13 defense counsel thus removing Ms. Archie's only proof of the insufficiency of the State's race-  
14 neutral reason for the challenge, if any were given." (*Id.*). Respondents assert that petitioner then  
15 "goes on for over four pages challenging that the bench conferences were not recorded; the fact that  
16 the jury did not compose a fair cross-section of the community; effectiveness of trial and appellate  
17 counsel; requesting discovery of records not presented to the state courts and arguing evidence  
18 purported demographic studies conducted years after Archie's trial." (ECF No. 37, referencing  
19 amended petition at ECF No. 34, pp. 26-30). Respondents argue that on direct appeal, petitioner  
20 raised the more discreet claim of a stand-alone *Batson* challenge. (*See* Exhibit 3, at pp. 22-24).

21 In the opening brief on direct appeal, petitioner argued that she received an unfair trial when  
22 the trial court refused to grant the defense's *Batson* challenge regarding the exclusion of prospective  
23 juror Henderson, an African-American juror. (Exhibit 3, at pp. 22-24). Petitioner argued that the  
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25 <sup>3</sup> *Batson v. Kentucky*, 476 U.S. 79 (1986).  
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1 prosecution did not establish a race-neutral reason for exercising its peremptory strike against  
2 prospective juror Henderson. (*Id.*).

3 Respondents are correct that petitioner failed to argue on her state appeal a specific claim that  
4 the trial court failed to record bench conferences concerning the *Batson* challenges. (Exhibit 3). As  
5 such, this portion of Ground 3 was not properly presented to the Nevada Supreme Court and is  
6 therefore unexhausted.

7 Petitioner also did not present to the state courts her claim that her rights to the effective  
8 assistance of counsel or equal protection were violated as a result of the makeup of the jury in her  
9 case. (Exhibit 3). As such, these claims are unexhausted.

10 Regarding petitioner's claim that the jury did not compose a fair cross-section of the  
11 community, petitioner argued in the opening brief on direct appeal that "he [Henderson] had been the  
12 only black male on the first voir dire panel." (*Id.*, at p. 24). Petitioner also argues in the opening  
13 brief that she was tried by a "jury that was not a cross-section of the community." (*Id.*). Thus, this  
14 Court deems exhausted the claim within Ground 3 that the jury was not a fair cross-section of the  
15 community. However, petitioner did not present the Nevada Supreme Court with evidence such as  
16 population records or studies during the relevant time period to support the claim that the jury did  
17 not compose a fair cross-section of the community. In the federal amended petition, in support of the  
18 argument that the jury was not a cross-section of the community, petitioner discusses a population  
19 demographic study that was conducted for the years 2007-2012. (ECF No. 34, at p. 28). The  
20 petition also includes a preliminary discovery request to obtain information from the Clark County  
21 Jury Commissioner relative to the argument that the jury did not compose a fair cross-section of the  
22 community. If a claim has been adjudicated on the merits by a state court, a federal habeas petitioner  
23 must overcome the burden set in § 2254(d) and (e) on the record that was before the state court.  
24 *Cullen v. Pinholster*, 131 S.Ct. 1388, 1400 (2011). As petitioner recognizes in the opposition, the  
25 Nevada Supreme Court considered the "makeup of the venire" in its order of February 25, 2010.

1 (Exhibit 1, at p. 7). But such discussion was not based on population demographic studies such as  
2 the one discussed in the federal petition. As such, petitioner's reference to and use of studies,  
3 reports, or other information that was not in the state court record, and specifically, was not  
4 presented to the Nevada Supreme Court, may not be used in this federal habeas corpus action to  
5 support petitioner's claims. *Pinholster*, 131 S.Ct. at 1400. Petitioner's claim that she was deprived  
6 of due process when the trial court refused to grant the defense's *Batson* challenge regarding the  
7 exclusion of prospective juror Henderson, an African-American juror, is exhausted.

#### 8 **4. Ground 4**

9 Petitioner alleges that her conviction and sentence violated her constitutional rights,  
10 specifically: (1) violated her right to a fair trial because of the joinder of counts charged against her  
11 co-defendant but not against petitioner; (2) violated her right to a trial by an unbiased jury; and (3)  
12 violated her right to have the charges against her proved beyond a reasonable doubt, due to the  
13 spillover effect of her co-defendant's crimes when she was tried in the same trial as the co-defendant.  
14 (ECF No. 34, at p. 31). The Court agrees with respondents that Ground 4 is duplicative of Ground 8,  
15 in which petitioner challenges the fact that the jury in petitioner's criminal trial was "death  
16 qualified." (ECF No. 34, at pp. 54-64). Also, to the extent that Ground 4 alleges a claim that the  
17 failure to sever exposed petitioner to claims with which she was not charged, those arguments are  
18 duplicative of Ground 2. (ECF No. 34, at pp. 19-25).

19 Moreover, several facts alleged in Ground 4 of the federal amended petition were not  
20 presented to the Nevada Supreme Court, and are therefore unexhausted. A claim is not exhausted  
21 unless the petitioner has presented to the state court the same operative facts and legal theory upon  
22 which his federal habeas claim is based. *Bland v. California Dept. Of Corrections*, 20 F.3d 1469,  
23 1473 (9<sup>th</sup> Cir. 1994). The exhaustion requirement is not met when the petitioner presents to the  
24 federal court facts or evidence which place the claim in a significantly different posture than it was in  
25 the state courts, or where different facts are presented at the federal level to support the same theory.  
26

1 *See Nevius v. Sumner*, 852 F.2d 463, 470 (9<sup>th</sup> Cir. 1988); *Pappageorge v. Sumner*, 688 F.2d 1294,  
2 1295 (9<sup>th</sup> Cir. 1982).

3 In petitioner's opening brief on direct appeal, petitioner argued the spillover claim as follows:

4 In the instant case, the evidence against Mr. Walker was  
5 overwhelming. Again, as mentioned above, if the State intended to try  
6 Mr. Walker with the Susan Simon counts then Ms. Archie should have  
7 been granted a separate trial. Ms. Archie was severely prejudiced by  
8 the introduction of the Susan Simon counts against Mr. Walker. Ms.  
9 Archie suffered unfair prejudice.

10 \* \* \*

11 In the instant case Ms. Archie should have been permitted a separate  
12 trial. The improper spillover effect to Ms. Archie was substantial.  
13 They jury was able to hear about Mr. Walker's crime against Susan  
14 Simon. Ms. Archie was not charged and the jury should not been able  
15 to consider it against her.

16 (Exhibit 3, at pp. 18-19). In the opening brief on direct appeal, petitioner specifically alleged the  
17 spillover evidence consisted of the "Susan Simon counts." (Exhibit 3, at pp. 18-20). In the federal  
18 amended petition, petitioner now argues that the spillover evidence includes: the use of crime scene  
19 photographs from a crime with which petitioner was charged; the fact that the Nevada Supreme  
20 Court reversed the jury verdict against petitioner for the attempted murder of Cole, and the testimony  
21 of witnesses pertaining to acts with which petitioner was charged. (ECF No. 34, at pp. 31-37).  
22 These additional facts concerning spillover evidence were not presented to the Nevada Supreme  
23 Court and are therefore unexhausted. Petitioner's claim that the failure to sever petitioner's case  
24 from her co-defendant subjected her to spillover evidence regarding the "Susan Simon counts,"  
25 (burglary and larceny) as pled in the fourth claim of petitioner's opening brief on direct appeal  
26 submitted to the Nevada Supreme Court, is exhausted.

## 23 5. Ground 5

24 Petitioner alleges that she was convicted and sentenced in violation of her equal protection  
25 and due process rights "when the State introduced inadmissible, prejudicial evidence without prior  
26 notice to the trial court or the defense." (ECF No. 34, at p. 38). Petitioner argues that evidence of 17



1 purses found in her apartment and evidence of her alias, Mary Smith, should not have been admitted  
2 into evidence during trial. (*Id.*). Petitioner alleges that the defense was not afforded a hearing  
3 pursuant to *Petrocelli v. State*, 101 Nev. 46, 692 P.2d 503 (1985), regarding the admissibility of  
4 uncharged bad acts and that evidence was introduced at trial in violation of NRS 48.045(2). (*Id.*).  
5 Respondents argue that Ground 5 is unexhausted, or in the alternative, raises no federal claims.

6 **a. Cognizability**

7 A petitioner in a federal habeas action is only entitled to relief “on the ground that he is in  
8 custody in violation of the Constitution or laws or treaties of the United States.” 28 U.S.C. §  
9 2254(a). Unless an issue of federal constitutional or statutory law is implicated by the facts  
10 presented, the claim is not cognizable under federal habeas corpus. *Estelle v. McGuire*, 502 U.S. 62,  
11 68 (1991). Federal habeas relief is generally not available to review questions about the  
12 admissibility of evidence. *Estelle*, 502 U.S. at 67. Allegations that a state court failed to properly  
13 apply state law are not cognizable in a federal habeas action. *See Swarthout v. Cooke*, 131 S.Ct. 859,  
14 862-63 (2011); *Engle v. Isaac*, 456 U.S. 107, 119 (1982); *see also Missouri v. Hunter*, 459 U.S. 359,  
15 368 (1983) (recognizing that federal courts on habeas review are bound by a state’s interpretation of  
16 that state’s statutory provisions); *Murdoch v. Castro*, 365 F.3d 699, 703 n.1 (9<sup>th</sup> Cir. 2004) (“We are  
17 not a State Supreme Court of errors; we do not review questions of state law. On federal habeas we  
18 may only consider whether the petitioner’s conviction violated constitutional norms. *Jammal v. Van*  
19 *de Kamp*, 926 F.2d 918, 919 (9<sup>th</sup> Cir. 1991).”). To the extent that petitioner asserts a violation of  
20 NRS 48.045(2) and that the trial court failed to conduct a *Petrocelli* hearing, those claims are  
21 questions of state law and are not cognizable in federal habeas corpus law.

22 However, in Ground 5 petitioner has also alleged that the introduction of prejudicial evidence  
23 was a violation of due process under the United States Constitution. The Ninth Circuit has held that,  
24 on habeas review, federal courts may not interfere with a state evidentiary ruling, but may only  
25 consider whether the evidence was so prejudicial that its admission violated fundamental due process  
26

1 and the right to a fair trial. *Fuller v. Roe*, 182 F.3d 699, 703 (9th Cir. 1999); *Windham v. Merkle*,  
2 163 F.3d 1092, 1103 (9th Cir. 1998); *Jeffries v. Blodgett*, 5 F.3d 1180, 1192 (1993). Federal courts  
3 “are not a state supreme court of errors; [they] do not review questions of state evidence law. On  
4 federal habeas [the courts] may only consider whether the petitioner’s conviction violated  
5 constitutional norms.” *Jammal v. Van De Kamp*, 926 F.2d 918, 919 (9th Cir. 1991) (citing *Engle v.*  
6 *Issac*, 456 U.S. 107, 119 (1982)). Petitioner’s due process challenge to the introduction of  
7 prejudicial evidence states a cognizable claim for federal habeas corpus relief. As the jurisprudence  
8 indicates, to obtain relief, petitioner ultimately must demonstrate that the admission of the evidence  
9 was so prejudicial that its admission violated fundamental due process.

#### 10 **b. Exhaustion**

11 Respondents argue that petitioner failed to properly federalize this claim when presenting it  
12 to the Nevada Supreme Court. Regarding petitioner’s challenge to the introduction of evidence  
13 regarding the 17 purses found in her apartment, respondents argue that in direct appeal proceedings,  
14 petitioner argued a violation of NRS 48.045(2) and cited two Nevada cases, including *Petrocelli v.*  
15 *State*. Respondents contend that neither of the state cases cited federal law. Regarding petitioner’s  
16 challenge to the introduction of evidence of her alias, Mary Smith, respondents argue that in direct  
17 appeal proceedings, petitioner argued a violation of NRS 48.045(2) and Nevada state law case  
18 *Tavares v. State*, 117 Nev. 725, 30 P.3d 1128 (2001).

19 In the opening brief on appeal to the Nevada Supreme Court, petitioner cited to the Fifth,  
20 Sixth, and Fourteenth Amendments of the United States Constitution, arguing that the evidence of 17  
21 purses in her home and use of her alias was “highly prejudicial and substantially outweighed the  
22 probative value.” (Exhibit 3, at p. 21). A petitioner does not exhaust state remedies by generally  
23 appealing to a broad constitutional provision alone. *See Gray v. Netherland*, 518 U.S. 152, 163 (9<sup>th</sup>  
24 Cir. 1996). In order to present the substance of a claim to a state court, the petitioner must reference  
25 a specific federal constitutional provision as well as a statement of facts that entitle the petitioner to  
26

1 relief. *Id.* at 162-63. This Court finds that petitioner’s allegation of a violation of the equal  
2 protection resulting from the admission of prejudicial evidence was not presented to the Nevada  
3 Supreme Court. As such, the equal protection claim within Ground 5 of the amended petition is  
4 unexhausted. However, the Court finds that petitioner did in fact exhaust the claim alleging a denial  
5 of due process and a fair trial based on the admission of alleged prejudicial evidence (the 17 purses  
6 and alias). (Exhibit 3, at pp. 20-22). Accordingly, petitioner’s due process regarding the admission  
7 of prejudicial evidence is exhausted.

## 8 **6. Ground 6**

9 Petitioner alleges double jeopardy, cruel and unusual punishment, equal protection, and due  
10 process violations because she was sentenced as a habitual offender. (ECF No. 34, at p. 43). First,  
11 petitioner asserts that she was sentenced under the “Large Habitual Offender Statute,” which she  
12 claims does not exist, rendering the sentence vague. Second, petitioner asserts that the sentences  
13 imposed violated the double jeopardy clause because she had been previously sentenced under the  
14 habitual offender statute. Third, petitioner argues that her prior felony convictions were not violent.  
15 Fourth, petitioner challenges the trial court’s findings at sentencing. Fifth, petitioner claims that the  
16 sentence is overly punitive as a sentence for a first violent felony conviction. Sixth, petitioner asserts  
17 “an evolving state of the habitual criminal offender statute,” noting the minutes of a 2010 Nevada  
18 legislative committee on criminal law, which posited that offenders with non-violent convictions be  
19 treated differently from more violent offenders. (ECF No. 34, at pp. 43-48).

### 20 **a. Exhaustion**

21 Respondents argue that Ground 6 is unexhausted. In the opening brief on direct appeal,  
22 petitioner presented the double jeopardy claim that her prior convictions had already been previously  
23 used to sentence her as a habitual offender; petitioner also presented a claim that her life without  
24 parole sentence was cruel and unusual punishment. (Exhibit 3, at pp. 24-25). The remaining claims  
25 made in Ground 6 of the amended federal petition were not presented to the Nevada Supreme Court.  
26

1 As such, the Court will allow petitioner's claims of double jeopardy and cruel and unusual  
 2 punishment to proceed as exhausted claims. All other sub-claims within Ground 6 are unexhausted.

### 3 **b. Cognizability**

4 Unless an issue of federal constitutional or statutory law is implicated by the facts presented,  
 5 the claim is not cognizable under federal habeas corpus. *Estelle v. McGuire*, 502 U.S. 62, 68 (1991).  
 6 Federal habeas relief is generally not available to review questions about the admissibility of  
 7 evidence. *Estelle*, 502 U.S. at 67. Allegations that a state court failed to properly apply state law are  
 8 not cognizable in a federal habeas action. *See Swarthout v. Cooke*, 131 S.Ct. 859, 862-63 (2011);  
 9 *Engle v. Isaac*, 456 U.S. 107, 119 (1982); *see also Missouri v. Hunter*, 459 U.S. 359, 368 (1983)  
 10 (recognizing that federal courts on habeas review are bound by a state's interpretation of that state's  
 11 statutory provisions); *Murdoch v. Castro*, 365 F.3d 699, 703 n.1 (9<sup>th</sup> Cir. 2004) ("We are not a State  
 12 Supreme Court of errors; we do not review questions of state law. On federal habeas we may only  
 13 consider whether the petitioner's conviction violated constitutional norms. *Jammal v. Van de Kamp*,  
 14 926 F.2d 918, 919 (9<sup>th</sup> Cir. 1991)."). To the extent that petitioner's claims in Ground 6 contest the  
 15 Nevada Supreme Court's application of purely state law, those claims are questions of state law and  
 16 are not cognizable in federal habeas corpus law.

### 17 **7. Ground 7**

18 Petitioner alleges that her rights to equal protection and due process were violated because  
 19 the trial court erred in giving jury instructions on express and implied malice and an instruction on  
 20 general intent relative to the State's burden of proof. (ECF No. 34, at p. 50). Ground 7 also contains  
 21 a claim of ineffective assistance of trial and appellate counsel for failing to object to or raise error  
 22 regarding the jury instructions. (*Id.*, at pp. 50-52). Respondents argue that Ground 7 is partially  
 23 unexhausted.

24 In the opening brief on direct appeal, petitioner alleged that the malice instructions were  
 25 impermissibly vague. (Exhibit 3, at pp. 25-27). Jury Instruction #17 defined "malice aforethought."  
 26

1 Jury Instruction #18 was the instruction on express and implied malice. The alleged offending  
2 language was the reference to the phrase “heart fatally bent on mischief” in Jury Instruction #17 and  
3 the phrase “abandoned or malignant heart” in Jury Instruction #18. (*Id.*).

4 In the amended federal petition, petitioner challenges the jury instructions on express and  
5 implied malice in Jury Instruction #18. Petitioner reiterates her objection to the phrase “heart fatally  
6 bent on mischief” in Jury Instruction #17, and adds a new objection to the phrase “reckless disregard  
7 for the consequences of social duty,” also from Jury Instruction #17. (ECF No. 34, at p. 50). The  
8 portion of this claim challenging the phrase “heart fatally bent on mischief” in Instruction #17 is  
9 exhausted, as petitioner presented the claim to the Nevada Supreme Court in her opening brief on  
10 direct appeal. (Exhibit 3, at pp. 25-27). However, the claim challenging the phrase “reckless  
11 disregard for the consequences of social duty” in Instruction #17 is unexhausted, as it was not  
12 presented to the Nevada Supreme Court.

13 Also in Ground 7 of the amended petition, petitioner presents a new claim that counsel was  
14 ineffective for failing to object to the implied malice instruction. (ECF No. 34, at p. 50). Petitioner  
15 further alleges that Jury Instruction #36, regarding general intent, “contained an improper mandatory  
16 presumption that petitioner’s intent was conclusively proven by the acts constituting the offense,”  
17 and that this instruction impermissibly reversed the burden of proof. (*Id.*, at pp. 51-52). Petitioner  
18 contends that counsel was ineffective for failing to raise appropriate objections to the general intent  
19 instruction. (*Id.*). Petitioner’s claim of ineffective assistance of counsel was never presented to the  
20 Nevada Supreme Court and is therefore unexhausted. Petitioner’s claim regarding the general intent  
21 instruction relating to the burden of proof also was never presented to the Nevada Supreme Court  
22 and is unexhausted. Petitioner’s claim to the phrase “heart fatally bent on mischief” in Jury  
23 Instruction #17 is exhausted.

24 //////////////

25 //////////////

1                   **8. Ground 8**

2           Petitioner alleges that she “was convicted and sentenced in violation of her rights under the  
3 Fifth and Fourteenth Amendments to the United States constitution to equal protection of the law  
4 and due process when the jury which convicted her was death-qualified and the trial court denied  
5 severance.” (ECF No. 34, at p. 54). Petitioner contends that because the trial court refused to sever  
6 her case from her co-defendant’s, she was subjected to being tried by a jury that was “death-  
7 qualified,” since her co-defendant was facing the death penalty. (*Id.*)

8           Respondents argue that Ground 8 is partially unexhausted. In the opening brief on direct  
9 appeal to the Nevada Supreme Court, petitioner presented the facts supporting her claims of a denial  
10 of a fair trial and due process. (Exhibit 3, at pp. 10-12). In the opposition to the motion to dismiss,  
11 petitioner argues that the equal protection claim was presented to the Nevada Supreme Court because  
12 she cited the Fourteenth Amendment in the opening brief on appeal. (ECF No. 38, at p. 16).  
13 Petitioner’s citation to the United States Constitution’s Fourteenth Amendment does not satisfy the  
14 exhaustion requirement regarding the alleged equal protection violation. A petitioner does not  
15 exhaust state remedies by generally appealing to a broad constitutional provision alone. *See Gray v.*  
16 *Netherland*, 518 U.S. 152, 163 (9<sup>th</sup> Cir. 1996). In order to present the substance of a claim to a state  
17 court, the petitioner must reference a specific federal constitutional provision as well as a statement  
18 of facts that entitle the petitioner to relief. *Id.* at 162-63. Petitioner did not present an equal  
19 protection claim regarding these facts to the Nevada Supreme Court. (*Id.*). As such, the equal  
20 protection claim in Ground 8 is unexhausted.

21           Additionally, Grounds 8 is partially unexhausted because the amended petition includes new  
22 factual allegations and arguments that were not presented to the Nevada Supreme Court. The first  
23 few pages of Ground 8 closely track the allegations and arguments made in petitioner’s opening brief  
24 to the Nevada Supreme Court, (*compare* ECF No. 34, at pp. 54-56 *with* Exhibit 3, at pp. 10-12).  
25 Petitioner then includes several pages alleging details of several potential jurors’ statements during  
26

1 the *voire dire* process. (ECF No. 34, at pp. 56-59). The exhaustion requirement is not met when the  
2 petitioner presents to the federal court facts or evidence which place the claim in a significantly  
3 different posture than it was in the state courts, or where different facts are presented at the federal  
4 level to support the same theory. *See Nevius v. Sumner*, 852 F.2d 463, 470 (9<sup>th</sup> Cir. 1988);  
5 *Pappageorge v. Sumner*, 688 F.2d 1294, 1295 (9<sup>th</sup> Cir. 1982). The additional facts concerning the  
6 potential jurors' statements place the claim in a significantly different posture than was presented to  
7 the Nevada Supreme Court. Therefore, this portion of Ground 8 is unexhausted.

8 In Ground 8 of the federal amended petition, petitioner argues that because the death-  
9 qualified jury convicted her of attempted murder, which was later reversed by the Nevada Supreme  
10 Court, this lends more credence to her argument that her trial should have been severed from her co-  
11 defendant's trial. (*See* ECF No. 34, at p. 59, lines 12-16; p. 60, at lines 11-15; p. 63, at lines 4-8).  
12 This argument, which arose after the reversal of petitioner's conviction for attempted murder, was  
13 never brought before the Nevada Supreme Court. As such, the claim that the Nevada Supreme  
14 Court's reversal of her attempted murder conviction lends more credence to the argument that her  
15 trial should have been severed from her co-defendant, is unexhausted. However, petitioner's claim  
16 that her right to due process was violated because the trial court refused to sever her case from her  
17 co-defendant's case, allowing a death-qualified jury to convict her, is exhausted.

### 18 **9. Ground 9**

19 In Ground 9, petitioner presents a claim of cumulative error. (ECF No. 34, at pp. 65-67).  
20 The cumulative error claim is exhausted to the extent it alleges claims that were fairly presented to  
21 the Nevada Supreme Court, as discussed, *supra*.

### 22 **III. Petitioner's Options Regarding Unexhausted Claims**

23 A federal court may not entertain a habeas petition unless the petitioner has exhausted  
24 available and adequate state court remedies with respect to all claims in the petition. *Rose v. Lundy*,  
25 455 U.S. 509, 510 (1982). A "mixed" petition containing both exhausted and unexhausted claims is  
26

1 subject to dismissal. *Id.* In the instant case, the Court has determined that several claims are  
 2 unexhausted, while several other claims are exhausted. Because the court finds that the amended  
 3 petition is a “mixed petition,” containing both exhausted and unexhausted claims, petitioner has the  
 4 following options:

- 5 1. She may submit a sworn declaration voluntarily abandoning the unexhausted  
 6 claims in the amended petition and proceed only on the exhausted claims;
- 7 2. She may return to state court to exhaust the unexhausted claims, in which case  
 8 the federal habeas petition will be denied without prejudice; or
- 9 3. She may file a motion asking this court for a stay and abeyance pursuant to  
 10 *Rhines v. Weber*, 544 U.S. 269 (2005), for the purpose of returning to state  
 11 court to exhaust the unexhausted claims.

12 *See Rose v. Lundy*, 455 U.S. 509, 510 (1982); *Rhines v. Weber*, 544 U.S. 269 (2005); *Kelly v. Small*,  
 13 315 F.3d 1063 (9th Cir. 2002); *King v. Ryan*, 564 F.3d 1133 (9th Cir. 2009). Petitioner’s failure to  
 14 choose any of the three options listed above, or seek other appropriate relief from this court, will  
 15 result in the federal habeas petition being dismissed. Counsel for petitioner is advised to familiarize  
 16 himself with the limitations periods for filing federal habeas petitions contained in 28 U.S.C. §  
 2244(d), as those limitations periods may have a direct and substantial effect on whatever choice he  
 17 makes regarding the petition.

#### 18 **IV. Conclusion**

19 **IT IS THEREFORE ORDERED** respondents’ motion to dismiss (ECF No. 37) the  
 20 amended petition is **GRANTED IN PART AND DENIED IN PART**, as follows:

21 **1. Grounds 1 and 2 of the amended petition relate back to the original petition and are  
 22 deemed timely.**

23 **2. In Ground 3 of the amended petition, the ineffective assistance of counsel claim and  
 24 the claim regarding the trial court’s failure to record bench conferences do not relate back to  
 25 the original petition. These two sub-claims of Ground 3 are dismissed with prejudice as  
 26 untimely.**



1           **3. In Ground 7 of the amended petition, the claims challenging the instructions**  
2 **concerning the burden of proof and the ineffective assistance of counsel claims do not relate**  
3 **back to the original petition. These sub-claims of Ground 7 are dismissed with prejudice with**  
4 **prejudice as untimely.**

5           **4. In Ground 1 of the amended petition, the Confrontation Clause claim is**  
6 **unexhausted. The remainder of Ground 1 is exhausted.**

7           **5. In Ground 2 of the amended petition, the following sub-claims are unexhausted: (a)**  
8 **the allegations concerning gruesome photographs of Christine Anziano and Kirk Cole; (b) the**  
9 **allegation regarding the jury's reliance on evidence of the color of the motor vehicle and**  
10 **surveys released after petitioner's trial discussing the color of vehicles in Las Vegas; (c) issues**  
11 **regarding the ownership of purses found in petitioner's residence; and (d) the claim that the**  
12 **trial court persuaded petitioner's counsel to relinquish the right to a limiting instruction**  
13 **relative to the theft of a purse from a vehicle. The remainder of Ground 2, alleging that**  
14 **petitioner was denied a due process and a fair trial because the trial court refused to grant a**  
15 **severance of the joint trial between petitioner and her co-defendant, forcing petitioner to be**  
16 **tried by a jury that was qualified to render a death sentence, is exhausted.**

17           **6. In Ground 3 of the amended petition, the following sub-claims are unexhausted: (a)**  
18 **the claim that the trial court failed to record bench conferences concerning the *Batson***  
19 **challenges; (b) the claim that petitioner's rights to the ineffective assistance of counsel and**  
20 **equal protection violated as a result of the makeup of the jury; and (c) petitioner's reference to**  
21 **and use of studies, reports, or other information that was not in the state court record.**  
22 **Petitioner's claim that she was deprived of due process when the trial court refused to grant**  
23 **the defense's *Batson* challenge regarding the exclusion of prospective juror Henderson, an**  
24 **African-American juror, is exhausted.**

1           **7. In Ground 4 of the amended petition, petitioner’s challenge to the “death qualified”**  
2 **jury is duplicative of Ground 8 of the amended petition. Petitioner’s claim that failure to sever**  
3 **her trial from her co-defendant’s trial exposed petitioner to claims with which she was not**  
4 **charged is duplicative of Ground 2. Petitioner’s allegations that spillover evidence includes the**  
5 **use of crime scene photographs from a crime with which petitioner was charged, the fact that**  
6 **the Nevada Supreme Court reversed the jury verdict against petitioner for the attempted**  
7 **murder of Cole, and the testimony of witnesses pertaining to acts with which petitioner was**  
8 **charged are unexhausted. Petitioner’s claim that the failure to sever petitioner’s case from her**  
9 **co-defendant subjected her to spillover evidence regarding the “Susan Simon counts,”**  
10 **(burglary and larceny) as pled in the fourth claim of petitioner’s opening brief on direct appeal**  
11 **submitted to the Nevada Supreme Court, is exhausted.**

12           **8. In Ground 5 of the amended petition, to the extent that petitioner asserts a violation**  
13 **of NRS 48.045(2) and that the trial court failed to conduct a *Petrocelli* hearing based on**  
14 **Nevada state law, these claims fail to state cognizable claim for federal habeas relief.**  
15 **Petitioner’s due process challenge to the introduction of prejudicial evidence states a**  
16 **cognizable claim for federal habeas relief. Petitioner’s equal protection claim is unexhausted.**  
17 **Petitioner’s claim that she was denied due process and a fair trial based on the admission of**  
18 **alleged prejudicial evidence (17 purses and alias) is exhausted.**

19           **9. In Ground 6 of the amended petition, the claims of double jeopardy and of cruel and**  
20 **unusual punishment are both cognizable in federal habeas corpus and are both exhausted. All**  
21 **other sub-claims within Ground 6 are unexhausted. To the extent that petitioner challenges**  
22 **the Nevada Supreme Court’s application of purely state law, those claims are not cognizable in**  
23 **federal habeas.**

24           **10. In Ground 7 of the amended petition, the following claims are unexhausted: (a)**  
25 **petitioner’s claim challenging the phrase “reckless disregard for the consequences of social**  
26

1 duty” in Jury Instruction #17; (b) petitioner’s claims of ineffective assistance of counsel; and  
2 (c) petitioner’s claim concerning Jury Instruction #36, regarding the general intent instruction  
3 and the burden of proof. Petitioner’s claim regarding express and implied malice in Jury  
4 Instruction #18 is exhausted. Petitioner’s claim challenging the phrase “heart fatally bent on  
5 mischief” in Jury Instruction #17 is exhausted.

6 11. In Ground 8 of the amended petition, the following portions are unexhausted: (a)  
7 the equal protection claim; (b) allegations regarding details of several potential jurors’  
8 statements during the *voire dire* process; and (c) petitioner’s argument that the Nevada  
9 Supreme Court’s reversal of the attempted murder conviction lends more credence to her  
10 argument that he trial should have been severed from her co-defendant’s trial. Petitioner’s  
11 claim that her right to due process was violated because the trial court refused to sever her  
12 case from her co-defendant’s case, allowing a death-qualified jury to convict her, is exhausted.

13 12. In Ground 9 of the amended petition, the cumulative error claim is exhausted to the  
14 extent that it encompasses claims that were fairly presented to the Nevada Supreme Court.

15 IT IS FURTHER ORDERED that within **thirty (30) days** from the date of entry of this  
16 order, petitioner **SHALL EITHER:** (1) inform this Court in a sworn declaration that she wishes to  
17 formally and forever abandon the unexhausted grounds for relief in her federal habeas petition and  
18 proceed on the exhausted grounds; **OR (2)** inform this Court in a sworn declaration that she wishes  
19 to dismiss this petition without prejudice in order to return to state court to exhaust the unexhausted  
20 claims; **OR (3)** file a motion for a stay and abeyance pursuant to *Rhines v. Weber*, 544 U.S. 269  
21 (2005), asking this Court to hold the exhausted claims in abeyance while she returns to state court to  
22 exhaust the unexhausted claims. If petitioner chooses to file a motion for a stay and abeyance, or  
23 seek other appropriate relief, respondents may respond to such motion as provided in Local Rule 7-2.

24 IT IS FURTHER ORDERED that if petitioner elects to abandon her unexhausted grounds,  
25 respondents shall have **thirty (30) days** from the date petitioner serves her declaration of  
26

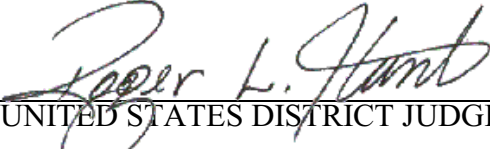
1 abandonment in which to file an answer to petitioner's remaining grounds for relief. The answer  
2 shall contain all substantive arguments as to the merits of all surviving grounds of the amended  
3 petition, and shall comply with Rule 5 of the Rules Governing Proceedings in the United States  
4 District Courts under 28 U.S.C. §2254.

5 **IT IS FURTHER ORDERED** that petitioner shall have **thirty (30) days** following service  
6 of respondents' answer in which to file a reply.

7 **IT IS FURTHER ORDERED** that if petitioner fails to respond to this order regarding her  
8 options for dealing with the unexhausted claims within the time permitted, this case may be  
9 dismissed.

10 **IT FURTHER IS ORDERED** that any further exhibits filed by the parties shall be filed  
11 with a separate index of exhibits identifying the exhibits by number or letter. The CM/ECF  
12 attachments that are filed further shall be identified by the number or numbers (or letter or letters) of  
13 the exhibits in the attachment. The hard copy of any additional exhibits shall be forwarded – for this  
14 case – to the staff attorneys in **Reno, Nevada**. The hard copy of all exhibits submitted to the Court  
15 shall be tabbed and shall be bound along the top edge of the pages.

16 Dated this 20<sup>th</sup> day of November, 2014.

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19 UNITED STATES DISTRICT JUDGE  
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